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April 12, 2011

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

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Public Record

Re National Trails Systems Act and Railroad Rights of Way – Notice of Proposed Rulemaking – Docket EP-702.

Dear Ms. Brown:

The following comments are submitted by the Rails-to-Trails Conservancy in response to the Notice of Proposed Rulemaking ("NPR") issued in the above-referenced matter.

Rails-to-Trails Conservancy (RTC) is a national nonprofit conservation organization founded in 1985. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC's mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC has more than 73,359 members nationally.

RTC concurs with the comments filed by Madison County Transit I(MCT) concerning this Board's implementation of the federal railbanking law, 16 U.S.C. § 1247(d). RTC offers the following additional comments in response to several of the questions posed by the NPR:

1. Should this Board require that notice that a railbanking/interim trail use agreement has been reached by filed with the STB within 10 days after an agreement is reached?

RTC has no objection to this provision, which codifies current practice. However, RTC believes that it would be helpful for the STB to clarify in the preamble that the requisite "agreement" may but need not be a formal conveyance of a property interest, and that the STB will allow late-filed notices upon the filing of an appropriate motion demonstrating that an agreement was in fact reached during the negotiating period.

2. Should the rules requiring indemnification of railroads be loosened for states to take into account sovereign immunity issues.

RTC strongly believes that the indemnification language that the Board is currently demanding of governmental entities is not statutorily required and undermines the national railbanking policy. Many states are barred by their constitutions from entering into indemnification agreements, and these laws are not easily revised. Requiring states to make assurances that they cannot lawfully make under state law, and that are not necessary or statutorily required for the protection of railroads, is fundamentally inconsistent with the Congress' mandate that the Chairman of this Board "shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs." 16 U.S.C. § 1247(d)

As MCT's comments point out, the railbanking law merely requires that the interim trail manager "assume full responsibility ... for any legal liability arising out of [interim trail use]." 16 U.S.C. § 1247(d). The statute does not use the words "indemnify," and there are numerous ways in which governmental entities that are themselves immune from liability can nonetheless assume full responsibility for the corridor, including all legal liability, without indemnifying railroads. For example, while states may be immune from liability, virtually all states have enacted limited waivers of their sovereign immunity in order to allow them to assume responsibility for the properties that they manage, including legal liability for such properties to the extent permitted by law. Further, many states have enacted recreational use statutes that protect railroads from liability arising from recreational trail use.

Moreover, a railroad will be unlikely to consent to enter into a railbanking/interim trail use agreement that does not adequately protect the railroad from additional liability resulting from interim trail use. Consistent with this Board's oft-stated policy of not interfering with the essentially private contractual arrangements between trail managers and railroads under the railbanking law, this Board should defer to the parties to negotiate an agreement that adequately protects railroads from any additional liability resulting from interim trail use. States and other governmental entities should therefore be permitted to assume responsibility for interim trails acquired under the railbanking law by asserting in their statements of willingness that their assumption of liability will be to the extent permitted by law.

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RTC particularly takes issue with the suggestion in the NPR that states do not need railbanking due to their powers of eminent domain. Given the complexity of the title issues involved in rail corridors, many states (and political subdivisions) are reluctant and unwilling to use eminent domain to acquire rail corridors as trails. Railbanking is and remains a particularly important mechanism for protecting long corridors that cross multiple jurisdictions. States are frequently the only entities that are the appropriate managers of such lengthy corridors, such as Missouri's 225-mile Katy Trail National Park, and Nebraska's 320-mile Cowboy Trail, the longest rail-trail in the country. Without the use of the railbanking, these state agencies would not have been able to acquire and preserve these extraordinary public resources.

3. Is there any mechanisms beyond newspaper notice that might help provide notice of possible rails-to-trails conversions.

RTC believe that general notice through the abandonment process has proven more than adequate to alert all interested persons to potential rails-to-trails conversions.

Please feel free to contact me if you would like any additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. Ferster', is written over the printed name.

Andrea C. Ferster, General Counsel  
Rails-to-Trails Conservancy